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35 pgs

No. 06–618

FILED
APR 0 3 2007
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SUPREME COURT, U.S.

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON, APPELLANT,

v.

BRAD HANSON, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING APPELLEE

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APRIL 2007

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BRIEF FOR THE UNITED STATES SENATE AS AMICUS CURIAE SUPPORTING APPELLEE

INTEREST OF AMICUS

This case presents the question whether the Speech or Debate Clause bars civil actions brought under the Congressional Accountability Act against the office of a United States Senator by employees with legislative duties. The United States Senate has a particular interest in the resolution of that question because the protections of the Speech or Debate Clause are vital to maintaining the Senate's independence within the three branches of government under the Constitution. Congress passed the Congressional Accountability Act to provide workplace protections for Legislative Branch employees — including Senate employees. The Senate has a strong interest in how the Act is interpreted in actions regarding its own employees and in harmony with the Speech or Debate Clause.

The Senate appears as amicus curiae to present its views that (1) the Speech or Debate Clause does not bar jurisdiction over suits under the Congressional Accountability Act brought by employees with legislative duties,

(2) suits under the Act against the office of a Member of Congress do not become moot when the Member leaves office, and (3) the Office of Senator Mark Dayton was not entitled to appeal the judgment of the Court of Appeals directly to this Court.[1]

STATUTORY BACKGROUND

To evaluate the questions presented in this case, it is helpful to review the history of congressional efforts to apply federal employment laws to congressional employees that led to the Act's enactment.

A. Congressional Efforts to Apply Employment Laws to House and Senate Employees

The Congressional Accountability Act of 1995 ("CAA" or "the Act"), Pub. L. No. 104-1, 109 Stat. 3, was the culmination of a twenty-year effort to apply to Congress the various discrimination and workplace laws that regulate employment decisions in the private sector and the Executive Branch. That effort began in the mid-1970s, when the House and Senate separately adopted rules prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin.[2] However, those

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[1] This appearance is pursuant to 2 U.S.C. § 288e(a), which authorizes the Senate to appear "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." *See* S. Res. 121, 110th Cong. (2007), 153 Cong. Rec. S3724 (daily ed. Mar. 23, 2007) (directing Senate appearance in this appeal). Permission to appear as amicus is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). This brief is submitted in accord with Supreme Court Rule 37.4, which provides that "[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative."

[2] *See* H.R. Res. 5, 94th Cong. (1975); S. Res. 534, 94th Cong. (1976), *reprinted in Senate Manual*, S. Doc. No. 107-1, at 135-36 (2002). S. Res. 534 also prohibited discrimination on the basis of "state of handicap." The next year the Senate adopted S. Res. 110, 95th Cong., which added a standing rule incorporating S. Res. 534's prohibitions on discrimination in Senate employment and adding a prohibition on age discrimination. Senate Rule XLII, *reprinted in* S. Doc. No. 107-1, at 77.

rules provided no redress to employees for personnel actions that violated the rules.[3]

Over the next fifteen years, efforts continued to grant congressional employees the protections of federal employment laws, and especially to provide effective remedies for employees who were victims of discrimination.[4] In 1988, the House of Representatives agreed to a resolution setting out internal procedures for enforcing the House's prohibition on employment discrimination. *See* H.R. Res. 558, 100th Cong. (1988). Three years later, the House incorporated that resolution into its rules. *See* H.R. Res. 5, 102d Cong. (1991) (incorporated as Rule LI).

In 1991, Congress passed the Government Employee Rights Act ("GERA"), as part of the Civil Rights Act of 1991. Pub. L. No. 102-166, title III, 105 Stat. 1088, *formerly codified at* 2 U.S.C. §§ 1301 *et seq.* (1994) (*repealed in part by* CAA, Pub. L. No. 104-1, § 504(a)(2)). GERA provided that "[a]ll personnel actions affecting employees of the Senate shall be made free from any discrimination based on . . . race, color, religion, sex, or national origin, . . . age, . . . or handicap or disability" as defined in the relevant federal civil rights laws. *Id.* § 302, 105 Stat. 1088. GERA created an internal administrative process for handling employee discrimination complaints, which included counseling, mediation, and, if necessary, a hearing before an independent hearing board on the employee's allegations of discrimination. *Id.* §§ 305-307, 105 Stat. 1090-92. GERA provided that decisions of the hearing board were subject to review by the Senate Select Committee on Ethics, *id.* § 308, 105 Stat. 1092, and that a party could seek judicial review of the final decision of

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[3] In 1978, the Senate Committee on Governmental Affairs reported a resolution that would have created an administrative mechanism within the Senate for implementing and enforcing the Senate rule prohibiting employment discrimination, *see* 124 Cong. Rec. 35545-46 (1978) (Sen. Glenn), but that resolution did not pass.

[4] *See, e.g.*, S. 1112, 96th Cong. (1979) (bill to apply employment laws to legislative branch); *Congressional Civil Rights Bills: Hearing Before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. (1990).

the Ethics Committee in the U.S. Court of Appeals for the Federal Circuit. *Id.* § 309, 105 Stat. 1093-94.

GERA's judicial review provision sparked lengthy debate in the Senate over whether such review comported with the separation of powers. *See* 137 Cong. Rec. 28902-22 (1991). During that debate, Senator Rudman raised a constitutional point of order that judicial review of claims by Senators' personal and committee staffs would constitute "an unconstitutional intrusion into the affairs of . . . the legislative branch[]." *Id.* at 28922. The Senate rejected that point of order by a 76-22 vote. *Id.*

Though these actions provided enhanced workplace protections, the Senate and House continued to study how to apply federal employment and workplace laws to employees of Congress with a full and effective remedy consistent with the Constitution.[5] In the 103d Congress, legislation was introduced to apply federal employment laws to Congress and to provide remedies congruent to those provided to private sector and Executive employees — particularly the right to file a civil action in federal court. One such bill, H.R. 4822, was passed by the House on August 10, 1994, *see* 140 Cong. Rec. 20773 (1994), but did not receive Senate action prior to adjournment.

B. Enactment of the CAA

At the opening of the 104th Congress, the long effort to apply employment laws to Congress culminated in the Congressional Accountability Act. Both Houses passed the CAA as their first piece of legislation, with only one vote against the Act in the entire Congress. *See* 141 Cong. Rec. 1076 (1995) (passed in Senate 98-1); *id.* at 1350-51 (passed in House 390-0).[6] In enacting the CAA, Congres-

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[5] *See Congressional Coverage Legislation: Applying Laws to Congress: Hearing Before the Senate Comm. on Governmental Affairs*, 103d Cong., S. Hrg. 103-1047 (1994); *Application of Laws and Administration of the Hill: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong., S. Hrg. 103-115 (1993).

[6] On January 4, 1995, the House of Representatives passed H.R. 1, a bill to make certain workplace and employment laws applicable to the Legislative Branch. 141 Cong. Rec. 544-45 (1995). On January 11,

sional sponsors and proponents explained that the legislation sought to achieve four goals.

First, the proponents wanted to end the "inequitable" situation where "we as employers do not have the same laws apply to us as private sector employers do."[7] Second, the CAA's supporters wanted to "requir[e] Congress [to] live under the laws it passes for others" in order to "know firsthand the burdens that the private sector lives with," 141 Cong. Rec. 650 (Sen. Grassley), because "Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch."[8] Members pointed out that exempting Congress from laws of general applicability removed one of the important bonds between legislators and the people expounded by James Madison in *The Federalist No. 57* (B. Wright ed. 1967):

> I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as

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the Senate passed its own bill (S. 2) extending workplace and employment laws to legislative employees. *Id.* at 1076. After receiving the Senate's version, the House chose to adopt it, *id.* at 1350-51, avoiding the need to reconcile the two competing bills in conference. After the House passed S. 2, it was signed by the President and became Public Law 104-1, the Congressional Accountability Act of 1995.

[7] 141 Cong. Rec. 654 (Sen. Grassley); *see also id.* at 956 (Sen. Lieberman) (Congressional exemption from federal employment laws represents "a double standard . . . that is no longer acceptable"); *id.* at 1334 (Rep. Shays).

[8] 141 Cong. Rec. 535 (Rep. Shays); *see also id.* at 655 (Sen. Glenn) ("we in Congress cannot understand the real impact of our laws because we do not have to follow them back here on Capitol Hill"); *id.* at 956 (Sen. Lieberman) (exempting Congress from employment statutes "shields us from the real world experience of understanding the impact of our deliberations and our actions on those millions of people out there, particularly small business people, who must live by the laws that we pass"); *id.* at 535 (Rep. Goodling) ("We will never be as careful as we should be in passing, changing, and drafting laws until we ourselves are forced to comply with those laws . . .").

> on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments, of which few governments have furnished examples; but without which every government degenerates into tyranny.

See id. at 650 (Sen. Grassley); *id.* at 665 (Sen. Snowe).

Third, the supporters of the legislation wanted to provide congressional employees with the full protections of employment laws that workers in the private sector and Executive Branch enjoyed.[9] Finally, the proponents wanted to ensure that the employment laws were applied to Congress in a manner that "respect[s] the separation of powers embodied in the Constitution." *Id.* at 535 (Rep. Shays). Accordingly, "[t]he bill was crafted to take into account constitutional issues," *id.* at 884 (Sen. Grassley), by "maintaining the independence of the legislative branch of Government." *Id.* at 668 (Sen. Reid); *see also id.* at 655 (Sen. Glenn) (legislation includes "protection of the constitutional independence of the House and Senate").

To accomplish these goals, the CAA makes applicable to the Legislative Branch the workplace and employment statutes governing private employers and the Executive Branch. CAA § 102 (2 U.S.C. § 1302). To enforce the protections provided by these laws, the CAA establishes an independent agency within the Legislative Branch, the Office of Compliance, to oversee compliance with the law. *Id.* §§ 301-305 (2 U.S.C. §§ 1381-1385). In addition, the CAA provides employees with counseling and mediation of employment disputes by the Office of Compliance. *Id.* §§ 402, 403 (2 U.S.C. §§ 1402, 1403).

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[9] *See, e.g., id.* at 655 (Sen. Glenn) ("to continue to deprive our employees of the full protection of the law is flat wrong"); *id.* at 660 (Sen. Lieberman) ("Congressional exemption from Federal employment laws . . . has also had an adverse effect on the legislative branch work force and its right to equal protection under the law.").

If mediation does not resolve the dispute, the CAA grants congressional employees the right to file an administrative complaint before the Office of Compliance, *id.* §§ 404, 405 (2 U.S.C. §§ 1404, 1405), or, unlike under GERA, to file suit in federal district court. *Id.* §§ 404, 408 (2 U.S.C. §§ 1404, 1408). The CAA requires that the defendant in such suits be the "employing office" and not any Member of Congress. *Id.* § 408(b) (2 U.S.C. § 1408(b)). Members are not responsible personally for any monetary judgments or settlements in CAA cases; rather, the Act creates a separate fund in the Treasury to pay judgments and settlements in wrongful personnel action cases. *Id.* § 415 (2 U.S.C. § 1415). Finally, the authorization for employees to pursue these remedies "shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under [the Speech or Debate Clause] of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, . . ." *Id.* § 413 (2 U.S.C. § 1413).

SUMMARY OF ARGUMENT

I. This appeal is not well-taken. Section 412 of the CAA (2 U.S.C. § 1412) permits appeals "directly to the Supreme Court" from decisions "upon the constitutionality of any provision" of the CAA. The decision below, however, was not a ruling upon the constitutionality of any provision of the CAA, but rather was a ruling on the scope of the Speech or Debate Clause and its application to the CAA. Therefore, the requirement for a direct appeal to this Court under section 412 is not met.

Indeed, if the contrary position of the Office of Senator Dayton ("Employing Office") were correct that a ruling denying the Office's assertion of Speech or Debate Clause immunity was a decision on the constitutionality of a provision of the CAA for purposes of section 412, then the district court's denial of the Employing Office's motion to dismiss was subject to appeal directly to this Court, and,

under *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam), this Court would be required to vacate the judgment of the D.C. Circuit for lack of jurisdiction under 28 U.S.C. § 1291 and dismiss this appeal.

The Employing Office's alternative request that the Court take this case under its certiorari jurisdiction should be denied because the decision below accords with this Court's precedent, and the two Circuits to have ruled on this question have both agreed that the Speech or Debate Clause does not bar jurisdiction over CAA suits by congressional employees.

II. The expiration of Senator Dayton's term has not mooted this case. No part of the CAA or its legislative history indicates that a Member's departure from Congress terminates suits against the Member's office. Moreover, the reason behind the abatement of actions for lack of a defendant — that no party exists to defend the action or to satisfy a judgment — does not apply here. The Employing Office, which is a unit of the Senate, maintains the ability to defend vigorously this action, and to satisfy any judgment or settlement from a Treasury fund created to pay such awards. Accordingly, this case remains a live controversy.

III. The Speech or Debate Clause provides Members of Congress with an absolute immunity for their legislative activities to "insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To effectuate that purpose, the Court has held that the Clause protects not just speech and debate on the floor of the House and Senate, but all actions that are "an integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings. *Gravel v. United States*, 408 U.S. 606, 625 (1972). While this Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *Eastland*, 421 U.S. at 501, it "has been careful not to extend the scope of the protection further

than its purposes require." *Forrester v. White*, 484 U.S. 219, 224 (1988). Thus, Members' activities that are only related to the legislative process, and not a part of the due functioning of that process, have been found to be outside of the Clause's protections. *See United States v. Brewster*, 408 U.S. 501, 512 (1972).

As the D.C. Circuit found, adverse personnel actions against congressional employees, including employees with legislative duties, are not themselves part of the legislative process. J.S.App. 15a-18a, 459 F.3d at 10-13; *id.* at 28a, 459 F.3d at 17 (Rogers, J., concurring in part and in the judgment). This Court's analysis in *Forrester*, 484 U.S. 219, holding that a state judge's discharge of a probation officer was not part of the judge's adjudicative function and thus was not covered by judicial immunity, applies equally to the congressional context and supports the conclusion that Members of Congress do not act in a legislative capacity when they take personnel actions. Hence, the Speech or Debate Clause does not bar jurisdiction over CAA suits brought by employees with legislative duties challenging adverse personnel actions.

While the Clause does not operate to preclude outright all CAA suits by employees with legislative duties, Congress recognized that the Clause's privilege could be implicated where particular proceedings in CAA suits encroached upon a Member's participation in the legislative process. Consequently, Congress structured the CAA's remedial scheme to insulate Members' independent performance of legislative functions. First, Congress expressly preserved the Speech or Debate Clause privilege of individual Members in CAA actions. CAA § 413 (2 U.S.C. § 1413). That privilege protects Members from being compelled to produce documents or testify about legislative acts or motivations, and bars relief that would infringe on a Member's independence in carrying out legislative activities. In contrast to the blanket jurisdictional bar asserted by the Employing Office, proper application of the Clause's privilege in CAA proceedings is fact-spe-

cific and, as recognized by the D.C. Circuit, must be determined on a case-by-case basis by the lower courts.

Further, Congress provided that civil actions could be brought against an employing office only and not against any Member, CAA § 408(b) (2 U.S.C. § 1408(b)); therefore, the employing office — not a Member of Congress — is the party against whom any judgment is entered. Moreover, judgments against employing offices in discrimination actions are paid from a special fund created for that purpose, *id.* § 415 (2 U.S.C. § 1415), and not by the Member personally nor from funds allotted to the Member's office. Thus, Congress created a specific mechanism for remedial actions to shield Members' legislative independence from intrusion.

By enacting the CAA with its particular remedial scheme, Congress determined, after specifically considering the impact of the Speech or Debate Clause, that suits against employing offices do not infringe on a Member's individual Speech or Debate immunity. This determination merits special deference by the Court for two reasons. First, Congress has both the most experience with application of the Speech or Debate Clause as well as the greatest interest in protecting the scope of immunity under the Clause. Second, the CAA involves management of the employment affairs solely of the Legislative Branch, over which Congress has unique authority. Accordingly, Congress's determination that it could provide federal employment protections to its own employees consistent with the Speech or Debate immunity of its Members deserves respect from the Judicial Branch.

ARGUMENT

I. THE EMPLOYING OFFICE IS NOT ENTITLED TO APPEAL TO THIS COURT

A. The Requirements of 2 U.S.C. § 1412 Are Not Met

Section 412 of the CAA (2 U.S.C. § 1412) provides that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitu-

tionality of any provision of this Act" and "[t]he Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . advance the appeal on the docket, and expedite the appeal to the greatest extent possible." This case does not meet the requirements for direct appeal because the D.C. Circuit's ruling that the Speech or Debate Clause does not bar federal court jurisdiction over this suit was not a "judgment, decree, or order . . . upon the constitutionality" of any provision of the CAA. Rather, that decision was a ruling on the scope of the Speech or Debate Clause. In no part of its opinion does the Court of Appeals rule upon the constitutionality of any provision of the CAA. Accordingly, in light of this Court's admonition that in evaluating its appellate jurisdiction "statutes authorizing appeals are to be strictly construed," *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 43 (1983) (citing *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970)), the Employing Office was not entitled to appeal the judgment below to this Court under section 412.

The Employing Office argues that by holding that "the Speech or Debate Clause does not constitutionally bar court adjudication of Hanson's claims," the D.C. Circuit implicitly ruled upon the constitutionality of CAA sections 408 and 413 as applied to suits by employees with legislative duties. Brief for Appellant at 14-15. Yet, nothing in the D.C. Circuit's ruling addressed the constitutionality of those (or any other) sections of the CAA. Indeed, by expressly preserving Members' Speech or Debate privileges in section 413, Congress made clear that the CAA's authorization of civil suits by employees was to be understood congruent with the Speech or Debate Clause. Consequently, a ruling on the scope of the Clause in CAA actions does not implicitly address the constitutionality of

the CAA, but rather resolves how the privilege preserved by section 413 applies in a given suit.[10]

The Employing Office's interpretation of section 412 would permit direct, expedited review in this Court over every ruling by a lower court applying the Speech or Debate Clause in a particular CAA case. For instance, every district court ruling on a Member's assertion of Speech or Debate privilege in response to discovery requests in a CAA case would qualify for direct review by this Court under the Employing Office's reading of section 412. Similarly, each time a court determined whether a particular remedy under the CAA intruded on a Member's Speech or Debate Clause immunity, its decision would be subject to direct appeal to this Court. And the limitation in section 412(b) that the Court should accept jurisdiction "if it has not previously ruled on the question" would be no limitation at all, as each dispute over the Speech or Debate privilege would involve its own particular circumstances and facts regarding legislative activities that would present a distinct question as to whether the Clause applied in that situation. An interpretation of section 412 that yields such an unbounded expansion of matters directly appealable to this Court cannot be squared with the Court's admonition to construe strictly statutes authorizing appeals.

Finally, if the Employing Office is correct that section 412 authorizes a direct appeal to this Court from a decision allowing adjudication of this suit despite the assertion of Speech or Debate Clause immunity, then the district court's denial of the motion to dismiss qualifies as a decision on the constitutionality of a part of the CAA for purposes of section 412, and this Court's decision in *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (per curiam), would require that this

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[10] That understanding comports with the issue presented by the Employing Office to the Court of Appeals: "In light of section 413, is court adjudication of this suit barred?" Brief of Appellant Office of Senator Mark Dayton at 3, filed July 11, 2005, USCA Case No. 04-5335.

appeal be dismissed and the Court of Appeals' decision vacated for lack of jurisdiction under 28 U.S.C. § 1291.

In *Donovan*, an association sued officials of the U.S. Department of Labor challenging application of the Fair Labor Standards Act. The district court held that the act was unconstitutional as applied. *Id.* at 389. At that time, title 28 contained a section that provided:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree, or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. § 1252 (1982), *repealed by* Pub. L. No. 100-352, § 1, 102 Stat. 662 (1988). Although the government in *Donovan* could have appealed the district court's ruling directly to the Supreme Court under that provision, it chose to appeal instead to the court of appeals, which affirmed the district court's decision. 454 U.S. at 389. The government then sought to invoke 28 U.S.C. § 1252 to appeal the decision of the court of appeals to the Supreme Court.

This Court ruled that because the government officials could have appealed the district court's judgment directly to the Supreme Court, the court of appeals lacked jurisdiction as 28 U.S.C. § 1291 provides jurisdiction to the courts of appeals "from all final decisions of district courts of the United States . . . *except where a direct review may be had in the Supreme Court*." 28 U.S.C. § 1291 (emphasis added); *Donovan*, 454 U.S. at 389-90. Accordingly, the Court held that because the court of appeals lacked jurisdiction under 28 U.S.C. § 1291, "its judgment and opinion must be vacated." 454 U.S. at 390. And, the Court concluded, the appeal from that decision "must be dismissed," as the "proper course of conduct was to file a direct appeal from the decision of the District Court." *Id.* The Court further noted that no appeal could be taken

from the district court's decision, as the time for an appeal under 28 U.S.C. § 2101(a) had expired, and declined to remand the case to the district court to enter a new judgment to re-open the time for appeal. *Id.* at 390-91.

Therefore, *if* the Employing Office's position were correct, then the Court of Appeals lacked jurisdiction over the appeal under 28 U.S.C. § 1291 because the district court's decision could have been appealed directly to the Supreme Court. Under *Donovan*, this Court would be required to dismiss this appeal and vacate the judgment of the D.C. Circuit for lack of jurisdiction.[11]

B. This Case Does Not Merit Certiorari Review

Alternatively, the Employing Office requests that the Court treat its jurisdictional statement as a petition for a writ of certiorari. As none of the considerations set forth in Supreme Court Rule 10 for granting such a writ are satisfied here, the Court should decline to hear this case under its certiorari jurisdiction. First, the Court of Appeals' decision does not conflict with decisions of this Court. As the opinion below reflects, and as explained further *infra*, section III, the Court of Appeals' conclusion that the Speech or Debate Clause does not bar jurisdiction over CAA suits by employees with legislative duties is based on and accords with this Court's established Speech or Debate Clause precedent and its decision in *Forrester v. White*, 484 U.S. 219, that judicial immunity does not protect a judge from suit for adverse personnel

[11] Insofar as the Employing Office asserted jurisdiction in the Court of Appeals under 28 U.S.C. § 1291, Brief of Appellant Office of Senator Mark Dayton at 2, filed July 11, 2005, USCA Case No. 04-5335, and the Court of Appeals noted that it had jurisdiction under that section, *see* J.S.App. 4a at n.1, 459 F.3d at 4 n.1, it would appear that neither the parties nor the Court of Appeals considered the denial of defendant's motion to dismiss to be a decision on the constitutionality of the CAA as to which "direct review may be had in the Supreme Court."

Nor is pursuing an intermediate appeal followed by appeal to this Court consistent with the purpose of the expedited direct appeal provision, which is to permit expeditious resolution by this Court of an unsettled question about the constitutionality of a federal statute.

actions against an employee who supported the judge's adjudicative function.

Further, the D.C. Circuit's decision does not conflict with the decision of any other court of appeals. To the contrary, the only other court of appeals to have reached the question presented here, the Tenth Circuit, held, as the D.C. Circuit did, that CAA actions by congressional employees are not barred by the Speech or Debate Clause. *See Bastien v. Office of Senator Ben Nighthorse Campbell*, 390 F.3d 1301, 1318-19 (10th Cir. 2004), *cert. denied*, 126 S. Ct. 396 (2005).

Finally, the D.C. Circuit's decision does not constitute an important question of federal law that "should be [] settled by this Court." Supreme Court Rule 10(c). All the judges on the D.C. Circuit en banc (as well as on the Tenth Circuit panel in *Bastien*) agreed on the main question presented here — that the Speech or Debate Clause does not bar jurisdiction over CAA suits. Thus, no uncertainty in that question necessitates Supreme Court review. The remaining issues on which the D.C. Circuit judges disagreed are matters that require a case-by-case determination that is appropriately conducted by the district court on a fully developed record.

Accordingly, this case does not present any question that merits the Court's resolution at this time, and the Court should reject the Employing Office's alternative request to review the D.C. Circuit's decision on certiorari.

II. SENATOR DAYTON'S DEPARTURE FROM CONGRESS DID NOT MOOT THIS CASE

On January 3, 2007, Senator Dayton's term expired. That same day the Employing Office filed with this Court a suggestion of mootness, asserting that it (the Employing Office) had ceased to exist and, therefore, this action has abated for lack of a defendant, rendering the case moot. A review of the CAA's remedial scheme in light of Congress's purpose to provide its employees workplace protections with meaningful remedies refutes any suggestion that CAA suits against employing offices abate when

a Member departs from Congress. Further, the defendant in this case remains capable of vigorously defending this action and of satisfying any monetary judgment entered against it. Accordingly, a live controversy remains and this case is not moot.

At common law, "the death of the natural person abates all pending litigation to which such a person is a party," and, similarly, the "dissolution of a corporation at common law abates all litigation in which the corporation is appearing." *Oklahoma Gas Co. v. Oklahoma*, 273 U.S. 242, 247 (1927). That Senator Dayton's term has expired, however, does not resolve whether the office has ceased to exist for purposes of this litigation. *Cf. Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634-35 (1949) ("a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions"). Determining whether this case has abated depends on both the intent of Congress and the existence of a defendant with the ability to defend the case vigorously and satisfy any judgment against it.

No provision of the CAA, nor any part of the Act's legislative history, indicates or even suggests that a cause of action against a Member's office would terminate when the Member leaves Congress. To the contrary, the structure of the CAA evinces an institutional basis for suits against Senate offices to survive the term of office of a particular Member. For example, the Act provides for the payment of money judgments and settlements against a Senate office by the Senate through funds appropriated for that purpose, and not by the Senator, *see* CAA § 415 (2 U.S.C. § 1415), thus providing that judgments will be paid regardless of the expiration of a Senator's term.[12]

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[12] While a claim for equitable relief (such as an order of reinstatement) may indeed become moot after the Senator's term has expired, Hanson expressly disclaimed any request for equitable relief early in this suit, stipulating that he is seeking only monetary damages. *See* Plaintiff's Stipulation to Accept Front Pay in Lieu of Reinstatement filed Oct. 30, 2003, J.A. 20-22.

The Employing Office relies for its mootness argument on the fact that the CAA specifies that the defendant in suits under the Act "shall be the employing office." *Id.* § 408(b) (2 U.S.C. § 1408(b)). Denominating the employing office as the defendant, however, merely indicates where the offending action is alleged to have occurred but has no significance on whether Congress intended a suit to abate after a Member left office.[13]

The employing office is nothing more than an administrative unit of the Senate; it is the Senate that provides the resources for the vigorous defense of suits[14] and for the payment of judgments. To abate a suit on the basis that the office is the nominal defendant is an exaltation of form over substance that should be rejected.[15] *Cf. Thompson v. United States*, 103 U.S. 480, 484 (1880) ("[I]f we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office," as "[t]he whole proceeding is really and in substance a proceeding against the township, as much as if it were named").

Moreover, the Employing Office's argument would produce arbitrary distinctions in the remedies afforded to

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[13] The Employing Office points out that, as set forth in the Senate administrative handbook, once a Senator's term expires, his or her office "cannot incur any financial obligations," stops receiving mail from the Senate Post Office, must "vacate the physical office space," and must settle its accounts with Senate support services. Brief for Appellant at 17-18. Yet, even after the Senator leaves office, the Senate continues to pay all financial obligations incurred during the Senator's term — including any liability of the office arising out of personnel actions taken during the Senator's term.

[14] *See Legislative Branch Appropriations, 2006*, S. Rep. No. 109-89, at 16 (2005) (Senate Chief Counsel for Employment provides "representation of Senate offices in all areas of employment law").

[15] Tellingly, under the CAA, staff in Senators' offices are considered "employee[s] of the Senate," CAA § 101(8) (2 U.S.C. § 1301(8)), and not of any specific employing office. Hence, an action against their employer is, in essence, an action against the Senate.

congressional employees. The Employing Office's view would make a Member's office essentially immune from liability for CAA claims within the Member's final years in Congress, as any lawsuit for adverse employment actions during that period would not reach final resolution prior to the Member's leaving office. Indeed, in two of the four reported CAA suits against the office of a Member of Congress — this case and the *Bastien* case — the term of the Senator whose office was the defendant expired before the case even proceeded to trial. Such an interpretation of the Act would leave a Senate employee's ability to seek redress for adverse employment actions subject to the vagaries of the timing of his or her Member's service in the Senate. The Employing Office's position also leads to the anomalous result that CAA suits brought by employees in Members' personal offices would abate with the expiration of the Member's term, yet suits by employees in other offices (e.g., committee staff and employees of House and Senate officers) would not. Nothing in the Act or its legislative history evinces any intent by Congress to provide a less effective remedy to one set of employees than another. To the contrary, a central purpose of the CAA was to provide a uniform effective remedy to all congressional employees.

Not only does abatement contradict Congress's intent in enacting the CAA, but it also serves no purpose here. The reason a suit abates when a defendant ceases to exist is because without a defendant "there is no one to respond to a judgment which might be or has been entered in a case," and thus, "the futility of . . . continuing is evident." *Acheson v. Fujiko Furusho*, 212 F.2d 284, 288 (9th Cir. 1954). As this appeal demonstrates, the Employing Office maintains ample existence to defend vigorously this action. In addition, any judgment against that office would be satisfied by the Senate from a separate fund authorized by the CAA. Hence, there is no merit to the suggestion that this case has ceased to be a live controversy from which plaintiff can secure meaningful relief.

III. THE SPEECH OR DEBATE CLAUSE DOES NOT BAR JURISDICTION OVER CAA SUITS

In extending federal employment protections to its workforce, Congress considered it vital to the "strong enforcement" of those protections that aggrieved employees have "the right for claims to be heard in court."[16] Indeed, many of the CAA's substantive protections already applied to the Senate under GERA, but those protections were "inadequate" because "the remedies that we provided were not the same remedies for Hill employees that private-sector employees have," *id.* at 884 (Sen. Grassley), particularly the right to bring a civil action in district court and receive a jury trial. In response to constitutional concerns over providing such a right of action, the CAA's sponsors explained their conviction that giving congressional employees the right to sue would not infringe on Members' Speech or Debate Clause privileges because, under this Court's teaching regarding judicial immunity in *Forrester*, 484 U.S. 219, personnel actions are not part of the due functioning of the legislative process protected by the Clause.

Congress's determination that it could regulate the employment rights of its own workforce in the carefully crafted scheme established by the CAA consistent with its role as a co-equal and independent branch of government and with its Members' Speech or Debate Clause privileges merits respect by this Court.

A. The Speech or Debate Clause Protects the Due Functioning of the Legislative Process

The Speech or Debate Clause of the Constitution provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "The pur-

[16] 141 Cong. Rec. 659 (Sen. Lieberman); *see also id.* at 543 (Rep. Fawell) (noting that right to file civil suit is "what put[s] the 'teeth'" into employment laws); *id.* at 650 (Sen. Grassley) ("judicial enforcement . . . is vital" if the CAA's protections "are to meaningfully apply").

pose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To further this goal of legislative independence, the Court has interpreted the Clause to protect from judicial inquiry activities that are an "integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973) (Speech or Debate Clause protects "anything 'generally done in a session of the House by one of its members in relation to the business before it'") (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)); *Eastland*, 421 U.S. at 501 (Clause covers acts "within the sphere of legitimate legislative activity").

The immunity provided by the Clause, where applicable, serves not merely as "a defense on the merits[,] but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969). The Clause also provides Members of Congress with a privilege against being compelled to testify or produce documents about legislative acts. *See Gravel*, 408 U.S. at 616 ("We have no doubt that Senator Gravel may not be made to answer — either in *terms of questions* or in terms of defending himself from prosecution — for the events that occurred at the subcommittee meeting.") (emphasis added); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995).[17]

While this Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *East-*

[17] To effectuate the Clause's purposes, the Court has held that the Speech or Debate Clause covers the actions of not only Members of Congress within the legislative sphere, but also congressional officers and employees when the conduct would be protected by the Clause if performed by a Member. *See Gravel*, 408 U.S. at 617-22; *Eastland*, 421 U.S. at 507.

land, 421 U.S. at 501, it also "has been careful not to extend the scope of the protection further than its purposes require." *Forrester*, 484 U.S. at 224. The Court has interpreted the scope of the Speech or Debate Clause's protections in light of the Clause's purpose "to insure that the *legislative function* the Constitution allocates to Congress may be performed independently." *Eastland*, 421 U.S. at 502 (emphasis added). Thus, the Clause's protections have been held to reach activities that are "clearly a part of . . . the *due* functioning of the [legislative] process," *United States v. Brewster*, 408 U.S. 501, 516 (1972), that is, those actions that are "an integral part of the deliberative and communicative processes by which Members participate in" legislative proceedings. *Gravel*, 408 U.S. at 625. However, in none of the Court's decisions has the Speech or Debate Clause's reach "been extended beyond the legislative sphere," *id.* at 624-25, to matters that merely relate to the legislative process. *Brewster*, 408 U.S. at 515 ("In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.").

Not everything a Member does falls within the Clause's reach, as the fact "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel*, 408 U.S. at 625. Thus, whether the Speech or Debate Clause bars jurisdiction over CAA claims by employees with legislative duties depends not on whether personnel actions are part of a Member's official duties, but on whether personnel actions are an integral part of a Member's participation in the legislative process.

B. Adverse Personnel Actions Against a Congressional Employee With Legislative Duties Are Not Themselves Part of the Due Functioning of the Legislative Process

Adverse personnel actions against congressional employees, including employees with some legislative duties, are not themselves part of "the *due* functioning of the

[legislative] process." *Brewster*, 408 U.S. at 516. While an employee's duties may support a Member's legislative function, the discharge of that employee is not itself "an integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings. *Gravel*, 408 U.S. at 625. Thus, the Speech or Debate Clause does not bar jurisdiction over CAA suits challenging such personnel actions.

This Court's decision in *Forrester v. White* supports this conclusion. In *Forrester*, a former state probation officer brought suit against the state judge who had discharged her, alleging discrimination on the basis of sex in violation of 42 U.S.C. § 1983. 484 U.S. at 221. The judge moved for summary judgment on the ground of judicial immunity. *Id.* at 222. The district court granted that motion, and the court of appeals affirmed. *Id.* This Court reversed, holding that the judge was not entitled to judicial immunity. The Court explained that the immunity analysis depends on "the nature of the function performed, not the identity of the actor who performed it." *Id.* at 229. Hence, the fact that the employer was a judge acting within his official authority to discharge the probation officer did not answer the immunity question. *Id.* at 230. Rather, the immunity analysis required a determination of whether the discharge fell within those acts that the immunity was created to protect.

Judicial immunity, the Court explained, protects "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants," *id.* at 225 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872)), the threat of which "would manifestly detract from independent and impartial adjudication." *Id.* at 226-27. Accordingly, the Court found that there was a distinction for immunity purposes "between judicial acts," which involve the adjudicative function, "and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* at 227. Finding that the judge was not performing adjudicative functions in

discharging the probation officer, the Court held that he was not entitled to judicial immunity. *Id.* at 229-30.

As Congress recognized in crafting the CAA, *Forrester*'s analysis of the scope of judicial immunity supports Congress's constitutional power to provide its employees with a cause of action under the CAA. *See, e.g.*, 141 Cong. Rec. 884 (Sen. Grassley) (citing reasoning in *Forrester* in support of Congress's power to establish a civil action consistent with Speech or Debate Clause); *id.* at 1328-31 (Rep. Goodling) (submitting 1991 Congressional Research Service memorandum, which stated "[o]n the strength of *Forrester*, a persuasive argument can be made that the speech or debate clause does not encompass employment decisions"). As with judicial immunity, the scope of the immunity provided by the Speech or Debate Clause reflects the purpose it serves and the legislative function it protects. Just as in *Forrester*, where the discharge of a judicial employee was found to be outside of the judge's adjudicative function, so here the discharge of a congressional employee falls outside of the legislative process.

The fact that the congressional employee may have duties that support a Member's legislative functions does not affect that conclusion. The probation officer in *Forrester* directly supported the judge's judicial function by preparing pre-sentence reports, as well as developing recommendations for disposition and placement in juvenile cases. 484 U.S. at 221. Yet, this Court still found the discharge to be outside the judicial function because, even though the personnel actions at issue "may have been quite important in providing the necessary conditions of a sound adjudicative system," such acts are nevertheless "not themselves judicial or adjudicative." *Id.* at 229. Similarly, while personnel actions affecting a congressional employee with legislative duties may be incidentally related to legislative affairs, those personnel actions are not themselves an "integral part of the deliberative and communicative processes by which Members participate" in legislative proceedings, *Gravel*, 408 U.S. at 625, and thus are not protected by the Speech or Debate Clause. *See*

Brewster, 408 U.S. at 528 ("The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself.").[18]

C. Congress Structured the CAA's Remedial Scheme to Preserve Members' Privileges and to Avoid Intruding Into Members' Independent Performance of Their Legislative Functions

By enacting the CAA, Congress determined that shielding adverse personnel actions from judicial scrutiny was not necessary to preserve the legislative independence of Members. At the same time, Congress recognized that specific proceedings and remedies in some CAA cases could, in their application, intrude upon Members' independence in carrying out their legislative duties. Accordingly, Congress structured the CAA's remedial scheme to insulate Members' legislative activities from intrusion.

First and foremost, Congress expressly provided that the Speech or Debate Clause privilege of Members is fully applicable in CAA suits. Section 413 of the Act (2 U.S.C. § 1413) provides, in pertinent part, "The authorization to bring judicial proceedings under sections 405(f)(3), 407, and 408 shall not constitute a waiver . . . of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution . . . ." The reserved privilege protects Members against attempts to compel testimony or evidentiary production arising from their legislative duties, such as in discovery in a civil action under section 408 or in response to subpoenas issued by the administrative tribunal in proceedings conducted pursuant to section 405(f)(3). In addition, the Speech or Debate privilege pro-

[18] The Employing Office's reliance on the presidential immunity recognized in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), fails because the contours of that immunity are based on the "unique position" of the President, *id.* at 749, and "the special nature of the President's constitutional office and functions." *Id.* at 756.

tects Members from remedies intruding into the performance of their legislative duties by either a district court in an action under section 408 or the court of appeals enforcing orders under section 407.

To interpret section 413's preservation of the Speech or Debate Clause privilege as a jurisdictional bar to CAA actions by all employees with any legislative duties, as the Employing Office argues, *see* Brief for Appellant at 10, 24, would mean that in enacting the CAA, Congress purported to provide its employees with a cause of action in section 408, only to take away that right from a large swath of those employees only five sections later in section 413. Such an unreasonable interpretation is contrary to the legislative history of the CAA and would undermine the Act's fundamental purposes to provide protections to all congressional employees and to educate Members about the operation of the laws they enact.[19]

Rather, applying the Speech or Debate privilege preserved in section 413 depends on the particular circumstances and facts as they develop in each case, and thus must be done, as all the judges in the D.C. Circuit's en banc decision recognized, on a case-by-case basis on a factual record before the district court.[20] Indeed, in a particular case, the privilege recognized in section 413 might result in dismissal of an employee's lawsuit from an inability of the employee to access necessary (yet protected) legislative information. That privilege, as the Court of Appeals recognized, also may prevent inquiry into the

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[19] The suggestion made below, *see* J.S.App. 27a, 459 F.3d at 17, that employees who would be barred from filing suit in court could nonetheless seek redress through the Office of Compliance administrative procedure, CAA § 405 (2 U.S.C. § 1405), fails to account for the fact that the Office of Compliance, which is independent of the House and Senate, is "any other Place," U.S. Const. art. I, § 6, cl. 1, where, under the Speech or Debate Clause, Members cannot be questioned about legislative acts.

[20] *See* J.S.App. 24a-27a, 459 F.3d at 15-17; J.S.App. 28a-29a, 459 F.3d at 18 (Rogers, J., concurring in part and in the judgment); J.S.App. 31a, 35a, 459 F.3d at 18, 21 (Tatel, J., concurring); J.S.App. 56a-57a, 459 F.3d at 32 (Brown, J., concurring in the judgment).

motivations behind personnel actions to the extent they are part of the due functioning of the legislative process. *See* J.S.App. 21a-26a, 459 F.3d at 14-16. But, as discussed above, the Clause does not *automatically* bar suits by legislative employees nor prevent a court from reviewing non-legislative reasons for an employee's termination.

Indeed, the Employing Office concedes that not all CAA actions by employees with legislative duties are barred by the Speech or Debate Clause, noting that a claim of hostile work environment could proceed, as it is not predicated on and does not question a legislative act. Brief for Appellant at 31-32. There is no logical reason for limiting this understanding to hostile work environment claims, as a variety of claims under the CAA may not implicate legislative decision-making. For example, as the D.C. Circuit recognized, Hanson's claim to overtime compensation under section 203 of the Act (2 U.S.C. § 1313), does not inherently present Speech or Debate issues. *See* J.S.App. 24a, 459 F.3d at 15 n.25.[21]

Moreover, facts in controversy pertinent to Hanson's claim under the Americans with Disabilities Act appear susceptible to adjudication without delving into the legislative sphere. *Compare* Complaint para. 9-14, 18-19, J.A. 12-14 (Hanson alleges he was fired *after* disclosing heart condition) *with* Answer to Complaint para. 9-10, filed Sept. 21, 2004, district court dkt #21 (Employing Office

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[21] The Employing Office argues that Hanson's overtime claim is barred by the Speech or Debate Clause because determining whether an employee is exempt from overtime pay requires an examination of that employee's duties, and when the employee has some legislative duties, such an examination constitutes "questioning about legislative acts because the job duties are legislative acts." Brief for Appellant at 40. Not only is this argument contrary to Speech or Debate Clause precedent, which requires a court to examine whether the action at issue constitutes an integral part of the legislative process, but it also contradicts the Employing Office's own test for applying the Clause in CAA cases, which would require, at a minimum, an examination of an employee's duties to determine if any are legislative and, thus, whether the personnel action involving that employee was a legislative act covered by the Clause.

asserts that Hanson was discharged *before* disclosing heart condition). It is unclear how litigating that factual issue, any more than litigating the facts in a hostile work environment case, would intrude into the Senator's legislative functions. More generally, employment cases by their very nature involve a wide range of factual circumstances that would need to be evaluated in each particular suit to determine whether a claim could be litigated without infringing on the legislative sphere.

To insulate Members further from intrusion into legislative independence, Congress provided that suits under the Act could be brought only against an employing office and not against any Member personally.[22] Because it is the employing office that is subjected to suit, it is that office — not an individual Member — that may be held liable and against whom any judgment would be entered.[23] In addition, the funds that pay any judgment against an employing office in a discrimination action do not come from the Member personally, nor from the funds allotted to the employing office; rather, the CAA provides for payment of any awards or settlements from a separate judgment fund in the Treasury established for this purpose. *See* CAA § 415 (2 U.S.C. § 1415).

Furthermore, final approval of all settlements under the CAA rests with the Executive Director of the Office of Compliance, *not* with the individual Member whose

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[22] CAA § 408(b) (2 U.S.C. § 1408(b)); *see* 141 Cong. Rec. 1337 (1995) (Rep. Fawell) ("[N]o Member of Congress may be personally sued, that is, such a suit would be against an employee's employing office, a term of new art which avoids naming any Member of Congress as the specific responding party to such a law suit.").

[23] To the extent that an employing office itself has Speech or Debate immunity – as Congress and its committees undoubtedly do, *see Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 1 (2004); *Eastland*, 421 U.S. at 501 – that immunity, like the sovereign immunity of the employing office, was waived by the Senate and House in enacting the CAA. Indeed, section 413 expressly preserves the Speech or Debate Clause privilege only for "Senator[s] and Member[s] of the House of Representatives," 2 U.S.C. § 1413, not for any institutional entities such as the employing office.

employing office is the defendant. *See id.* § 414 (2 U.S.C. § 1414). And, under the CAA, both the House and Senate maintain the authority to establish rules "governing the process by which a settlement may be entered into . . . by any employing office." *Id.* Thus, the settlement of CAA actions is not within the ultimate control of the Member, but of the Senate and House, as well as the Office of Compliance.

Accordingly, as Members are not the subject of court judgments, do not pay any awards or settlements, and do not have final authority to settle claims, the Act insulates Members from being "questioned" as defendants in lawsuits. Combined with the Speech or Debate privilege preserved in section 413, Congress has created a remedial scheme in the CAA that provides needed workplace protections to its employees while carefully protecting its Members' legislative functions.

D. The Court Should Respect Congress's Determination That Suits Against Employing Offices Under the CAA Do Not Infringe on Members' Speech or Debate Clause Immunity

Because Congress "is a coequal branch of government whose Members take the same oath [as judges] to uphold the Constitution," this Court accords "deference" to "the judgments of Congress" in enacting legislation, particularly when Congress considered the very question before the Court. *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In enacting the CAA, Congress considered at length the constitutional issues raised by the Act, and took "[g]reat care" to structure the enforcement scheme so as "to maintain the integrity of Congress as a separate branch of Government." 141 Cong. Rec. 684 (1995) (Sen. Roth).

The Act's sponsors specifically considered Speech or Debate Clause concerns, concluding "that [the Clause] should not and cannot provide Members of Congress with immunity for illegal employment actions . . . in our capacity as employers of those who work for and with us here on Capitol Hill." *Id.* at 957 (Sen. Lieberman). In-

deed, the Act's sponsors specifically relied on the Court's decision in *Forrester* as support for their conclusion that personnel actions by Members of Congress are not part of the legislative process and, thus, are not protected by the Speech or Debate Clause. *See id.* at 884 (Sen. Grassley).

The Court should give special deference to Congress's action in this case because the immunity at issue pertains only to Congress and its Members. Congress has both the most experience with application of that immunity and the greatest interest in protecting a full and robust scope for its immunity. *See McConnell v. FEC*, 540 U.S. 93, 137 (2003) (according "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise"). Just as this Court recognized in *Forrester* that judges were "inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function," 484 U.S. at 226, so the Court can expect Congress to be equally solicitous of its own immunities. Congress's "expressed decision . . . that employment decisions of Members can be placed outside coverage of the [Speech or Debate] clause" constitutes "a determination by the body most familiar with the issue," which "should be entitled to special deference by the courts." 141 Cong. Rec. 958 (Sen. Lieberman) (quoting Congressional Research Service memorandum).

Congress's enactment of the CAA also merits heightened deference because it involves Congress's own workplace. The CAA does not affect the public at large, or either of the other two branches of government, but concerns a matter of governance within the Legislative Branch. Congress's decision on how to provide federal employment protections for its own employees should be respected by the Judicial Branch. *See id.* at 884 (Sen. Grassley) ("The bill was crafted to take into account constitutional issues," and courts should "permit Congress to exercise these powers against its own activities").

Accordingly, this Court should respect Congress's considered determination that it can provide its own employees with a right to bring civil suits against their employ-

ing office to vindicate their fair employment rights without infringing on Members' Speech or Debate privileges.

CONCLUSION

For the foregoing reasons, the Court lacks jurisdiction over this appeal. If the Court does reach the merits of this case, it should affirm the judgment below because the case has not become moot and the Speech or Debate Clause does not bar jurisdiction over this suit.

Respectfully submitted,

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APRIL 2007